

BEFORE THE
ENVIRONMENTAL MANAGEMENT DEPARTMENT
COUNTY OF SACRAMENTO
STATE OF CALIFORNIA

In the Matter of the Appeal of the Issuance of
Revised Solid Waste Facility Permit
SWIS#34-AA-002 to the NORTH AREA
TRANSFER STATION, by:

COALITION FOR ALTERNATIVES TO
KIEFER LANDFILL,

Appellant.

OAH No. N2005110821

RULING ON MOTIONS

On January 11, 2006, in Sacramento, California, Leonard L. Scott, Administrative Law Judge, Office of Administrative Hearings, State of California, conducted the Prehearing Conference in this matter.

Kelly T. Smith, Attorney at Law, represented appellant Coalition for Alternatives to Kiefer Landfill (Coalition).

John E. Reed, Deputy County Counsel, represented respondent the County of Sacramento (County) Environmental Management Department (Environmental Management).

HISTORY OF THE CASE

1. At the Prehearing Conference, the parties were granted time to submit written argument regarding five issues, which revolve around the issuance of the permit and the appeal of the issuance. A tentative ruling on the issues was due and served upon the parties on March 22, 2006. A continued Prehearing Conference was set for March 24, 2006, with a final ruling due after any further argument. However, after receipt of the tentative ruling, the parties each sent a written notice that there was no need for a further Prehearing Conference and the ruling could be issued as final.

2. On October 27, 2005, Environmental Management, the Local Enforcement Agency (LEA) pursuant to the Public Resources Code, voted to issue a permit to the North Area Transfer Station (Transfer Station). Environmental Management, when it acts as a LEA, is acting under a delegation of authority from the California Integrated Waste Management Board (Board) pursuant to Public Resources Code section 43000, et seq.

Before issuance, the permit was reviewed by the California Integrated Waste Management Board (Board) at its November 15, 2005, meeting, and the Board concurred in or approved the issuance of the permit.

After the Board approved the permit, Environmental Management issued the permit on November 17, 2005.

3. The Coalition appealed the issuance and filed a "Statement of Issues," dated November 2, 2005. The Statement of Issues was addressed to Environmental Management, and stated in relevant part:

RE: Request for appeal hearing; revised facility permit; Sacramento County
North Area Recovery Station (NARS)

...

Pursuant to California Public Resources Code section 44307, the Coalition for Alternatives to Kiefer Landfill requests a hearing on the appeal of the issuance of a solid waste facility permit revision for the Sacramento County North Area Recovery Station (NARS).

The issues directed to appeal include the following:

1. Improper issuance of "emergency" permits by LEA.
2. Selective enforcement and lack of enforcement by LEA.
3. Failure to properly require environmental review of project approvals.
4. Conflicts of interest between County and LEA.

...

4. The Coalition does not operate a solid waste facility and is not a party to the permit that was issued. It brought the appeal as an interested outside party pursuant to Public Resources Code section 44307.

5. Environmental Management responded to the Statement of Issues by raising a number of concerns, including filing a demurrer, claiming that the Statement of Issues was so vague that it could not determine what the issues are on appeal.

DISCUSSION OF THE ISSUES

1. The first issue is:

Due to concurrence by the California Integrated Waste Management Board (CIWMB) in the permit issued, does this forum lack jurisdiction to rule on any issue regarding the amended North Area Transfer Station permit or, in the alternative, did this matter become moot when the CIWMB acted?

The Coalition filed its appeal pursuant to the provisions of Public Resources Code section 44307, which is entitled Conditions for Hearing, and which provides:

From the date of issuance of a permit that imposes conditions that are inappropriate, as contended by the applicant, or after the taking of any enforcement action pursuant to Part 5 (commencing with Section 45000) by the enforcement agency, the enforcement agency shall hold a hearing, if requested to do so, by the person subject to the action. The enforcement agency shall also hold a hearing upon a petition to the enforcement agency from any person requesting the enforcement agency to review an alleged failure of the agency to act as required by law or regulation. A hearing shall be held in accordance with the procedures specified in Section 44310.

The second sentence of section 44307 allows "any person" to request a hearing "to review an alleged failure of the agency (LEA) to act as required by law or regulation." The difficulty occurs in situations where, as here, the Board also acts to approve or concur in the issuance of the permit, as it did on November 15, 2005.

This is an appeal to the LEA of an action by the LEA, but the Board has also acted on the matter by concurring in or approving the issuance of the permit. When the Board acted, the issuance of the permit became an action of the Board, and the action of the LEA was subsumed into that of the Board. As a result, there is no authority at this level to hear the appeal because it is an appeal of an action by the Board. Thus, any appeal of the issuance of the permit in to the North Area Transfer Station must be an appeal from the Board's action, not from the LEA's action, and this forum has no authority to decide such appeals.

Therefore, this forum has no jurisdiction to hear this appeal from an action by the Board.

2. The second issue is:

If this forum has authority to hear the matter, are the available remedies restricted to those in Public Resources Code section 44307 and California Code of Regulations, title 14, section 18086?

If there was jurisdiction to hold the hearing, which there is not, then the remedies available would be those found in Public Resources Code sections 44300 through 44307, plus section 44310, possibly section 45000 through 45023, and California Code of Regulations, title 14, section 18086.

However, the remedies in sections 44300 (denial of permit), 44305 and 44306 (suspension or revocation of permit), and sections 45000 through 4523 (corrective action, cease and desist orders, and penalties) are all directed against the facility operator and all require that the facility operator be a party to the hearing, so they are unavailable here. Section 44307 authorizes the appeal of an LEA action, but contains no remedies.

California Code of Regulations, title 14, section 18086, which is entitled Types of Board Actions Over LEAs, provides:

If the Board finds that an LEA is not fulfilling one or more of its responsibilities and/or obligations under Public Resources Code Division 30, Part 4, Chapter 2 (the "Solid Waste Facilities Chapter of the Waste Management Act") and/or these implementing regulations, then the Board, in accordance with Public Resources Code Section 43215 and 43216.5, may take one or more of the following actions:

- (a) Assume responsibility for specified LEA duties by partially or fully decertifying an LEA, either permanently or through a temporary suspension. Such an assumption of responsibility shall only extend to the LEA duties so specified by the board. The board may charge for operations pursuant to PRC 43212(a) while performing enforcement agency duties.
- (b) Conduct more frequent inspections and evaluations within an LEA's jurisdiction.
- (c) Establish a schedule and probationary period for improved performance by an LEA, and/or call for the submission of an evaluation workplan.
- (d) Withdrawal of the Board's approval of the local governing body's designation of the LEA.
- (e) Implement any other measures which may be determined by the Board to be necessary to improve LEA compliance.

Section 18086 provides no remedies for the concerns raised in this appeal. It deals with situations where the Board finds it necessary to assume some or all of the functions of an LEA, but provides no authority to rescind a permit, once issued.

In its written argument, appellant claims that Public Resources Code section 44310, subdivision (c), provides a remedy pursuant to section 45017, subdivision (a)(3), which authorizes the issuance of a cease and desist order.

Section 44310, subdivision (c), provides in relevant part:

All hearings conducted pursuant to this chapter shall be based on the following procedures:

...

(c) Within five days from the conclusion of the hearing, the hearing panel or hearing officer shall issue its decision. The decision shall become effective as provided in Section 45017.

Section 44310 establishes the procedural rules for certain types of hearings, and, for remedies, refers to section 45017. As argued by appellant, the relevant portion of section 45017 is subdivision (a)(3), which provides in relevant part:

(3) A cease and desist order issued pursuant to Section 44002 shall take effect upon service on the affected person and a request for a hearing shall not stay the effect of the order, notwithstanding the completion of any administrative appeal, if the cease and desist order is issued to a person operating a solid waste facility on a property for which a solid waste facilities permit is required, and one of the following applies:

(A) The person has not applied for any solid waste facilities permit for that property before the date of the issuance of the cease and desist order.

(B) The person has been denied a solid waste facilities permit for the operation on that property for which a solid waste facilities permit is required.

Section 45017, subdivision (a)(3), authorizes the issuance of cease and desist orders, but only as provided for by section 44002. Section 44002, which is entitled Operation without permit prohibited: violations: cease and desist order, provides in relevant part:

(a)(1) No person shall operate a solid waste facility without a solid waste facilities permit if that facility is required to have a permit pursuant to this division.

Clearly, neither section 45017, subdivision (a)(3), nor section 44002 is applicable to the issues in this matter because here the facility operator has a permit, and appellant wants to rescind its issuance. In addition, for sections 45017 and 44002 to apply, the facility operator must be a party to the action, which is not the situation here. Thus, if this matter went to hearing, the remedies available would be very limited, if any exist.

3. The third issue is:

What is the impact of the County's demurrer for vagueness against appellant's Statement of Issues? (The demurrer could also be viewed as a motion to dismiss for failure to provide sufficient specificity to give notice to the County of the issues, as required by due process and the statutory scheme.)

If there was jurisdiction to hold the hearing, which there is not, then the Statement of Issues, as set forth above, would fail to provide the notice required by due process. The Statement of Issues fails to provide sufficient specificity to notify respondent of the factual bases of the alleged violation or violations, of the specific sections of the Public Resources Code and/or California Code of Regulations, title 14, allegedly violated, and of the remedy sought, with the statutory or regulatory basis for such remedy. Such specificity is required by due process so that respondent may prepare a defense and defend against the allegations.

4. The fourth issue is:

Since appellant does not operate a competing solid waste facility affected by the permit, does it have legal standing to raise the issue of selective enforcement and/or disparate treatment?

If there was jurisdiction to hold the hearing, which there is not, then appellant failed in the Statement of Issues to allege a factual, and a statutory and/or regulatory basis to establish legal standing to raise this issue. Although a licensed operator of a solid waste facility might have standing to raise this issue, appellant is not a licensed operator, and failed to otherwise allege a factual and legal basis for standing.

In its written argument, appellant attempted to change the issue, and now seeks to base it upon Public Resources Code section 43300.5. That section is part of Article 2, which commences at section 43000, et seq. The Article is entitled "Powers and Duties of the Board." Section 43300.5 is entitled Requirement of Equal Enforcement Against Public and Private Entities, and provides:

The enforcement policies of this division shall be applied equally and without distinction to publicly owned or operated, and to privately owned or operated, solid waste facilities.

Section 43300.5 is a limitation upon the actions of the Board, and of the Board's designees, the LEAs. However, it does not of itself provide legal standing for appellant, which

is not an operator of a solid waste facility, to raise the issue. Therefore, if this hearing went forward, this allegation would be dismissed for lack of legal standing to raise it.

5. The fifth issue is:

Does Environmental Management, the LEA, as a part of the County, have a conflict of interest when issuing solid waste facility permits to the North Area Transfer Station, also a part of the County, in light of the statutory and regulatory scheme for such functions found in the Public Resources Code and the California Code of Regulations, title 14, especially the provisions of Regulation section 18051, subdivision (d)?

If there was jurisdiction to hold the hearing, which there is not, then appellant failed to provide the required legal and factual specificity in the Statement of Issues, which simply alleges:

4. Conflicts of interest between County and LEA.


Appellant failed to allege a factual or a legal basis for this allegation in the Statement of Issues. In its written argument in support of this allegation, appellant cited only its request for a hearing pursuant to section 44307, and the provisions of section 43300.5, as set out above, as the bases for this allegation. However, neither provides a legal basis for this allegation. The law and the regulations anticipated situations where a county would designate one of its agencies or departments as the LEA, while, through another agency or department, operating a solid waste facility. The law and the regulations provide for such situations in the Public Resources Code, at section 43000, et seq., and especially at section 43200, et seq., and section 43300, et seq., and in California Code of Regulations, title 14, section 18000, et seq., especially sections 18051 and 18054.

In addition, since the Board is the approving authority for designation of an LEA, any appeal of the legitimacy of that designation would have to be made to the Board.

ORDER

The appeal of the Coalition for Alternatives to Kiefer Landfill is dismissed for lack of jurisdiction, pursuant to the determination of the first issue.

Dated: April 3, 2006


LEONARD L. SCOTT
Administrative Law Judge
Office of Administrative Hearings

PROOF OF SERVICE

I, **Traci Murry**, declare as follows: I am over 18 years of age and have no interest in the action within; my place of employment and business address is:

**Office of Administrative Hearings
560 J Street
Suite 300
Sacramento, CA 95814**

On **April 11, 2006**, I served a copy of the following entitled action:

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to each of the person(s) named below, at the address set out next to each name, by the following method:

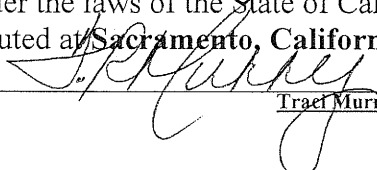
John E. Reed
700 H Street - Suite 2650
Sacramento, CA 95814

Kelly T. Smith
1541 Corporate Way - Suite 100
Sacramento, CA 95831

- ☐ **US MAIL** — by enclosing the action in a sealed envelope and placing the envelope for collection and mailing on that date and at the Office of Administrative Hearings, , State of California, following ordinary business practices. I am readily familiar with the Office of Administrative Hearings' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.
- ☒ **FACSIMILE TRANSMISSION** — by personally transmitting to the above-named person(s), who has previously agreed to receive documents via facsimile transmission, to the facsimile number(s) shown above, on the date and time listed below, from facsimile machine number (916) 323-6439, pursuant to California Rules of Court, rules 2003-2008, Government Code section 11440.20, and California Code Regulations, title 1, section 1008, subdivision (d). A true copy of the above-described documents(s) was transmitted by facsimile transmission and the transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached to this proof of service.
- ☐ **MESSENGER SERVICE** — by causing such envelope(s) to be delivered to the office of the addressee(s) listed above by:
- ☐ **PERSONAL SERVICE** — by causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s) listed above, pursuant to California Code Regulations, title 1, section 1008, subdivision (b)

Name of Person to whom document delivered:

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, and this Declaration was executed at **Sacramento, California** at **12:48 PM** on the **11** of **April**, 2006.


Traci Murry